



- (3) Whether claimant is entitled to six weeks of temporary total disability compensation.
- (4) Whether claimant is entitled to an award of \$265 for unauthorized medical expense of Dr. Edward J. Prostic.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs and hearing the arguments of the parties, the Appeals Board finds as follows:

(1)(2) The Administrative Law Judge found that claimant had presented credible, persuasive evidence to prove that the repetitive shoveling activities he performed in October of 1989 while working for respondent permanently aggravated his preexisting ankylosing spondylitis. The Administrative Law Judge went on to find that claimant was entitled to permanent partial general body disability benefits based on a 16 percent permanent functional impairment. The claimant did not present evidence of work disability and, therefore, work disability was not an issue.

The respondent argued that claimant had not proven that the shoveling activities performed at work permanently aggravated his ankylosing spondylitis condition. Respondent pointed out that claimant was examined at the request of respondent's insurance carrier on November 28, 1989 by orthopedic surgeon, Roger W. Hood, M.D. Dr. Hood opined that claimant's low back strain and left groin strain seemed to be work related. However, Dr. Hood testified that at the time of claimant's examination symptoms had subsided and he released claimant to return to regular work without permanent restrictions. Dr. Hood also opined that claimant had no permanent partial disability as a result of that injury. Dr. Hood, however, did not diagnose claimant as having a preexisting ankylosing spondylitis condition. Respondent contended that further proof that claimant did not have a permanent disability was the fact that claimant had been able to continue working since December 1989 and had not sought medical treatment for his low back condition from December 1989 until June of 1991. At that time, as a result of a preliminary hearing, claimant saw Dr. Takacs for his low back condition. Respondent also argued that claimant's present symptoms are not related to his work activities of October 1989 but instead are the result of two intervening automobile accidents which occurred in 1990 and 1993.

The claimant presented evidence through his testimony and the testimony of orthopedic surgeons, Dr. Edward J. Prostic and Dr. Ernest H. Neighbor. Claimant was referred to Dr. Prostic by his attorney and Dr. Neighbor was appointed by the Administrative Law Judge to perform an independent medical examination. Both doctors diagnosed claimant with ankylosing spondylitis and opined that his work activities permanently aggravated or accelerated his ankylosing spondylitis condition. The Appeals Board is mindful that Dr. Neighbor's opinion, regarding a causal connection between claimant's work activities and his permanent low back injury, was somewhat equivocal during his testimony on cross-examination by respondent. However, after examining his testimony as a whole, the Appeals Board finds Dr. Neighbor's opinion persuasive that the claimant's work activities did permanently aggravate or accelerate claimant's preexisting ankylosing spondylitis condition. Dr. Prostic opined that claimant's permanent functional disability as a result of his low back injury was 15 percent. Dr. Neighbor attributed 17 percent of claimant's total permanent functional impairment to his low back injury.

Claimant testified that prior to October 1989, his low back was asymptomatic. However, as a result of his present low back injury, claimant testified that he is unable to do any heavy lifting or climbing. In order to get in and out of his dump truck claimant has had to add an extra step because of his low back injury. Claimant also has installed a new air-ride seat with a lumbar support in his truck to reduce the pain while driving. Claimant further testified that he continues to be symptomatic and has to take over-the-counter medication in the form of aspirin and Motrin for the continuing pain.

The Appeals Board finds that the evidentiary record as a whole supports the Administrative Law Judge's finding that claimant's work activities permanently aggravated his preexisting ankylosing spondylitis condition. The Appeals Board also finds that the Administrative Law Judge's finding that claimant is entitled to a 16 percent permanent partial general body disability is appropriate. Accordingly, the Appeals Board affirms the Administrative Law Judge's Award in reference to those two issues.

(3) The Administrative Law Judge awarded claimant six weeks of temporary total disability benefits from the time claimant testified he was taken off work by Dr. DeStefano, on October 18, 1989, until he was released for work by Dr. Hood on November 29, 1989. Respondent argued that without medical evidence the Administrative Law Judge cannot award temporary total disability benefits. The Appeals Board finds that claimant's testimony established that he was unable to work after his low back injury. That evidence was uncontradicted by the respondent until he was examined, at the request of the respondent, by Dr. Hood who released him to return to work. Medical evidence is not necessary to establish disability in a workers compensation case. See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). Accordingly, the Appeals Board affirms the Administrative Law Judge's finding that claimant is entitled to six weeks of temporary total benefits.

(4) Respondent challenged the Administrative Law Judge's Award of \$265 unauthorized medical for Dr. Prostic's examination. Respondent does not state an argument anywhere in the record as to why unauthorized medical expenses should not be awarded pursuant to K.S.A. 1989 Supp. 44-510(c)(2). Accordingly, the Appeals Board affirms the Administrative Law Judge's award of unauthorized medical expenses.

The Appeals Board finds that the Administrative Law Judge has set out his findings of fact and conclusions of law in some detail in the Award and it is unnecessary to repeat those findings and conclusions in this Order. The findings and conclusions of the Administrative Law Judge are found to be accurate and appropriate. Therefore, we adopt those findings and conclusions as our own that are not inconsistent with the findings and conclusions in this Order.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler, dated January 25, 1996, should be, and is hereby, affirmed as follows:

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Curtis Morrison, and against the respondent, Harper Waterproofing, and its insurance carrier CIGNA Insurance Company, for an accidental injury which occurred October 18, 1989.

Based upon an average weekly wage of \$146.73, claimant is entitled to 6 weeks of temporary total disability compensation at the rate of \$97.82 per week or \$586.92, followed by 409 weeks at the rate of \$15.65 per week or \$6,400.85 for a 16% permanent partial general body disability, making a total award of \$6,987.77.

As of July 25, 1996, there is due and owing claimant 6 weeks of temporary total disability compensation at the rate of \$97.82 per week or \$586.92, followed by 347.14 weeks of permanent partial disability compensation at the rate of \$15.65 per week in the sum of \$5,432.74, for a total of \$6,019.66 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$968.11 is to be paid at the rate of \$15.65 per week, until fully paid or further order of the Director.

Unauthorized medical treatment in the amount of \$350 is also awarded.

Costs of transcripts in the record are taxed against respondent and its insurance carrier as follows:

Hostetler & Associates, Inc.	\$1,085.35
Richard Kupper & Associates	\$ 307.80
Metropolitan Court Reporters, Inc.	\$ 719.40

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael R. Lawless, Overland Park, KS  
Timothy G. Lutz, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director